In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 77-1547

DOUGLAS OIL COMPANY OF CALIFORNIA AND PHILLIPS PETROLEUM COMPANY, *Petitioners,*

vs.

PETROL STOPS NORTHWEST; GAS-A-TRON OF ARIZONA; COINOCO; UNITED STATES OF AMERICA, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CONOCO; UNITED STATES OF AMERICA, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

Douglas Oil Company of California and Phillips Petroleum Company[1] respectfully petition this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 20, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto at pages A-1 through A-8. No memorandum opinion of the District Court was issued. The reporter's transcript of proceedings of the District Court on March 28, 1977, appears in Appendix B hereto at pages B-1 through B-16.

[1] Hereinafter referred to as Douglas and Phillips.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 20, 1978. This Petition for Writ of Certiorari was timely filed pursuant to 28 U.S.C. § 2101(c) within ninety days of the entry of judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the district court in which the civil action is pending — the court familiar with the lawsuit and charged with responsibility for its administration — is the proper court to determine issues of relevancy and "particularized need" when secret grand jury transcripts are sought, rather than the judge of a foreign court who is unfamiliar with both the civil action for which the transcripts are sought and the criminal action which was brought as a result of the grand jury proceedings.

2. Whether the plaintiffs in a civil action have established a compelling necessity ("particularized need") for wholesale discovery of secret grand jury transcripts merely by showing that several defendants pleaded *nolo contendere* to a grand jury antitrust indictment returned over one year *after* the civil action was filed where the conspiracy alleged in the indictment is not the same conspiracy as that alleged in the civil action and where the matters considered by the grand jury are not shown even to be relevant to the civil action.

STATUTE INVOLVED

Federal Rule of Criminal Procedure, Rule 6(e):

(1) *General rule.* A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made

under paragraph (2)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

(2) *Exceptions.*

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to:

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made:

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

(3) *Sealed indictments.* The Federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

STATEMENT OF THE CASE

In 1973, two separate lawsuits were filed in the United States District Court, District of Arizona — one by respondent Petrol Stops Northwest and the other by respondents Gas-A-Tron of Arizona and Coinoco[2] — against a number of gasoline refiners and wholesalers. Phillips was named as a defendant in both lawsuits and Douglas was named in one. Although charging myriad purported antitrust violations, the gravamen of the Arizona complaints is the defendants' alleged conspiracy to restrict the plaintiffs' supply of gasoline.[3]

On March 17, 1975, over *one year after* the Arizona complaints were filed, an indictment was returned in the United States District Court, Central District of California charging Phillips, Douglas and four other corporate defendants with a conspiracy to fix the price of

[2] For convenience respondents Petrol Stops Northwest, Gas-A-Tron of Arizona and Coinoco will hereinafter be referred to as "Petrol Stops."

[3] The Petrol Stops complaint, for example, alleges that plaintiff's supply of gasoline has "been drastically reduced pursuant to violations of the antitrust laws alleged in this complaint and plaintiff has been forced to close many of its outlets."

"rebrand gasoline."[4] *None* of the defendants in the grand jury indictment other than Douglas and Phillips were named in either Arizona action. *None* of the refiners and wholesalers named in the Arizona actions, except Douglas and Phillips, were named in the indictment.

In October of 1976, pursuant to Rule 34 of the Federal Rules of Civil Procedure, Petrol Stops filed and served in the Arizona actions a request for all of the grand jury documents and transcripts in the possession of Douglas and Phillips.[5] Douglas and Phillips objected to the production of those items on the grounds that they were not relevant to the Arizona litigation. Rather than challenging that objection in the Arizona court, Petrol Stops instead filed a petition for production with the District Court for the Central District of California, a court wholly unfamiliar with the underlying civil actions. Said petition sought the disclosure of those same documents and transcripts, copies of which were in the possession of the Antitrust Division of the United States Department of Justice.

The Antitrust Division did not object to the disclosure, but suggested that Douglas and Phillips ought to be afforded the right to be heard. Douglas and Phillips thereupon appeared as real parties in interest and opposed the petition, arguing that the Arizona court was the proper court to determine relevancy and need, and that Petrol Stops ought not to be permitted to "forum shop". In its papers in support of the petition, Petrol Stops made only a single offering of fact to demonstrate its "particularized need" for the production of the grand jury materials, namely that Douglas and Phillips had

[4] The indictment defined "rebrand gasoline" as "gasoline sold for resale in service stations under a trademark or brand name not owned or controlled by an oil refiner."

[5] Douglas and Phillips have in their possession all documents produced by them to the grand jury and all transcripts of testimony of their employees and former employees before the grand jury.

stated in response to one of Petrol Stops' interrogatories that they were unaware of any conversations or communications with their competitors regarding the wholesale price of gasoline sold to unbranded (independent) marketers in the western states. Although the indictment involved different defendants and was not shown to involve the same sphere of business as the Arizona lawsuits, Petrol Stops nevertheless argued that since Douglas and Phillips had pleaded *nolo contendere* in the criminal action, the transcripts and documents would be useful in assisting discovery and in impeaching the interrogatory response.

At the hearing on the petition, the District Judge admitted that he had not been involved with the grand jury proceeding and that he had "no information about the considerations of problems that the grand jury had when they considered this matter. . . . " (Appendix, at B-4) In his comments, the District Judge indicated that he had no firm foundation for a belief that the requested grand jury material would be relevant to the Arizona lawsuits, and added that he did not think that relevancy was important to the considerations involved. Specifically, the judge stated:

> "The petitioners [respondents herein] seemed to think it [the grand jury transcript] is relevant. Apparently it involves an allegation of antitrust violation by Douglas and Phillips, and apparently that is what the grand jury proceedings involved. Apparently employees of Douglas and Phillips testified. They may be the same employees that will be expected to testify again. *I don't know.* But suppose it isn't relevant? If there is no harm in going through the list of reasons of [sic] the sanctity of the grand jury proceedings, if there is no harm in its being divulged, *why are we worried particularly about whether or not it is relevant?*" [Emphasis added.] (Appendix, at B-8)

The District Court entered an order granting Petrol Stops' production request with certain limitations on use of the materials. Douglas and Phillips sought and obtained a stay of the order pending appeal to the Court of Appeals for the Ninth Circuit. On March 20, 1978, the Court of Appeals affirmed the order of the District Court. In so deciding, the Court of Appeals in pertinent part held:

> "Petrol Stops showed a particularized need beyond the mere relevance of the materials. It showed that some of the answers Douglas and Phillips made to its interrogatories might contradict the charges in the indictment."[6] (Appendix, at A-7)

REASONS FOR GRANTING THE WRIT

This Court enunciated the standards governing the secrecy of grand jury materials in *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958). As stated by this Court,

> "The witnesses in antitrust suits may be employees or even officers of potential defendants, or their customers, their competitors, their suppliers. The grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow. This 'indispensa-

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[6] On October 31, 1977, Petrol Stops moved to supplement the appellate record with unfinished and unsigned deposition testimony which purportedly showed additional need and which was not before the District Court when it ruled upon the Petrol Stops petition. The Court of Appeals (per Judge Hufstedler) denied the motion, but added that ". . . the materials in issue may be lodged with the Court for such use as the panel which determines this appeal on its merits deems proper." (Order entered Dec. 5, 1977). These materials, which were *never* before the District Court, nevertheless found their way into the appellate opinion. "On appeal Petrol Stops make a stronger showing, pointing out inconsistencies between the government's bill of particulars and statements made in recent depositions." (Appendix, at A-7)

ble secrecy of grand jury proceedings' . . . must not be broken except where there is a compelling necessity. There are instances when that need will outweigh the countervailing policy. But they must be shown with particularity."

The courts below have utterly failed, however, to apply those standards in this case. This failure is largely attributable to the procedure followed, for the District Court was without adequate information and incentive to undertake the sensitive balancing required to determine whether a showing of particularized need sufficient to warrant the wholesale disclosure of grand jury transcripts and documents to civil plaintiffs had been made. This case presents considerations of great importance involving both the allocation of responsibility among district courts for determining questions of particularized need and the showing by civil plaintiffs, if any, that is now required to procure secret grand jury transcripts.

I. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL PROCEDURE WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT; NAMELY, WHETHER A DISTRICT COURT NOT FAMILIAR WITH THE ISSUES OF A CIVIL PROCEEDING IN CONNECTION WITH WHICH GRAND JURY MATERIALS ARE SOUGHT SHOULD NEVERTHELESS MAKE A DETERMINATION OF RELEVANCY AND PARTICULARIZED NEED IN CONNECTION WITH A PETITION UNDER RULE 6(e) F.R.Cr.P. FOR DISCOVERY OF THE GRAND JURY MATERIALS.

This case typifies the problems which arise when a district court, which has no familiarity with the civil lawsuit pending in another jurisdiction, is called upon to determine whether a party to that foreign lawsuit

has demonstrated a particularized need for disclosure of the grand jury materials. The determination of "particularized need" requires a balancing of the continued reasons for grand jury secrecy against the compelling necessity of the private party litigant for that information. *Procter & Gamble, supra,* 356 U.S. at 682. That balancing can only effectively be done by the court in which the civil suit is pending.

Where, as here, the grand jury proceedings have been completed, the court in which the civil suit is pending can identify the remaining reasons for grand jury secrecy as well as the court in which the grand jury proceedings were held. Normally, where a civil litigant seeks grand jury materials after the criminal case has been concluded, the primary reason for continued secrecy is the need to encourage free and untrammeled disclosure of information in future grand jury proceedings. *Procter & Gamble, supra.* Because that consideration involves general issues of policy rather than particular facts, no one district court is better equipped than another to gauge the import of that concern. In particular where the judge hearing the petition for disclosure of grand jury materials is not the same judge who had jurisdiction over the criminal action resulting from the indictment (as was the case here) it would make little difference which judge considered the need for continued grand jury secrecy.

Conversely, only one court — the court in which the civil suit is pending — is capable of assessing whether a civil litigant actually has a particularized need for the grand jury material sought. That court has all the information, or at least the incentive to acquire all of the information, necessary to determine whether grand jury materials are relevant to the instant lawsuit and whether a particularized need beyond mere relevance exists. The court in which the civil action is pending is therefore the

only court that could reasonably be expected to undertake the sensitive balancing required by this Court in *Procter & Gamble*. Where, as in this case, materials are sought in a protracted antitrust case, a foreign court cannot be expected to educate itself as to the complex legal and factual aspects of the case. To avoid that burden, the California District Judge here simply ruled that the question of relevancy was not important.[7]

The proper solution to this problem was reached by Chief Judge Clary in the United States District Court for the Eastern District of Pennsylvania in *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 486 (E.D. Pa. 1962). There, Judge Clary, after considering the need for continued secrecy, made available to other trial judges in other jurisdictions the grand jury transcripts which were in his jurisdiction in order that the other trial judges could make the determination of particularized need which they alone would have been competent to make in the disposition of the civil cases before them.[8] The California District Court was invited

[7] Where the District Court Judge below (Judge Gray) was subsequently asked to permit disclosure of these same grand jury materials in a different civil action over which *he* was presiding, his response was much different. In *Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, MDL 150 WPG, Judge Gray's own case, he refused to grant a motion of the plaintiffs in that litigation (filed after the petition herein) for discovery of, among other things, the very same transcripts and documents which he ordered turned over to Petrol Stops in this case. Where his understanding of the case and motivation were greater, Judge Gray exercised considerable restraint and required careful showings of relevance and particularized need. This contrasts significantly with his approach in this matter where he lacked that understanding.

[8] In this case, the court in which the civil suits are pending (the Arizona court) has jurisdiction over the documents in the possession of the defendants while the court in which the grand jury sat (the California court) has jurisdiction over the documents in the possession of the government. Where an Arizona plaintiff seeks disclosure of grand jury materials the proper procedure, consistent with the concerns articulated above, would be for the California court to make the grand jury materials available to the *judge* presiding over the Arizona lawsuits for whatever disposition that judge deems proper.

to follow such a procedure but declined.[9] Instead, it took upon itself the responsibility for determining issues (relevancy and particularized need) on which it was not adequately informed, and attempted to excuse this lack of information by erroneously holding that such issues were not important.

II. BY VIRTUE OF THE PROCEDURAL INFIRMITY DISCUSSED ABOVE, THE COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH A DECISION OF THIS COURT AND WITH DECISIONS OF OTHER CIRCUITS.

A. The Decision of the Court of Appeals Conflicts with a Decision of This Court.

In *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958), this Court explicitly prescribed the manner in which "particularized need" was to be determined by the lower courts if disclosure of secret grand jury materials was to be permitted. As a minimum showing, a trial judge must require: (1) that the relevancy and useful-

[9] Petrol Stops argued below that the District Court Judge offered to allow the Arizona courts an opportunity to determine particularized need, but that Douglas and Phillips rejected that request. At the hearing on the petition, in response to the protestations of counsel for Douglas and Phillips, the District Court Judge only gratuitously offered to "telephone Judge Walsh and Judge Frey [the Arizona judges] to see if they have any objection." The District Court Judge did not, however, propose to submit the matter to the Arizona judges for a determination of the issues of relevancy and particularized need. A casual telephone call does not satisfy the hearing requirements of federal law. Such a call to see if the Arizona judges "had any objection" to the ruling of a California judge is not nearly the same as a hearing on the merits of relevancy and particularized need. Moreover, it is clear from the context of the District Court Judge's remarks that the offer was not seriously intended to invite acceptance. (Appendix, at B-7)

ness of the testimony be sufficiently established; (2) that proof be required that without the transcript the party would be greatly prejudiced, or without reference to it an injustice would be done; and (3) that the need shown be "*particularized*", *i.e.*, that the need exists for grand jury transcripts specifically to impeach *a* witness, to refresh *a* witness' recollection, or to test *a* witness' credibility. 356 U.S. at 682-83.

The California District Court Judge, with neither the information, the time, nor the incentive to examine whether or not the grand jury materials were relevant to a complex antitrust lawsuit filed in a different district well before the indictment was returned, and whether or not particularized need existed, did not carry out this Court's mandate principally because he could not. In affirming the District Court's action, the Court of Appeals also failed to follow the principles set out by this Court.

The District Court did not require that the relevancy and usefulness of the testimony be sufficiently established and in fact expressed the opinion that it was not particularly worried whether or not the materials were even relevant to the Arizona lawsuits. (Appendix, at B-8) No presumption of relevancy could have existed for it is clear that the indictments and the civil actions differed as to identity of the alleged conspirators.[10] Likewise, no showing was ever made that the scope of the alleged conspiracies were the same. The District Court did not require from Petrol Stops any proof or substantial showing that without the transcripts Petrol Stops would be

[10] The indictment named Douglas, Phillips and four other corporate defendants ("four corporate co-defendants"). The suit brought by Gas-A-Tron of Arizona and Coinoco named Phillips and eight additional oil companies but not Douglas and the four corporate co-defendants. The suit initiated by Petrol Stops Northwest charged twelve defendants, including Phillips and Douglas, but not the four other corporate co-defendants.

greatly prejudiced or injustice would be done. Finally, the District Court failed to require any showing by Petrol Stops that its need for the grand jury materials was sufficiently particularized. The purported "particularized need" offered before the District Court by Petrol Stops was an alleged need to impeach an interrogatory answer. However, because the conspiracy charged in the indictment is different from the conspiracies alleged in the civil actions, the testimony in the grand jury transcripts could not be used for impeachment since it would be on collateral matters. *See* generally, IIIA *Wigmore On Evidence*, §§1001-1002 (Chadbourn Rev. 1970). Thus, the purported need advanced by Petrol Stops was neither particularized nor real.

The inability of the District Court to examine adequately those matters necessary to determine whether particularized need existed has resulted in the application of a "slight need" standard by the Court of Appeals. That standard, measured by the holding of the court upon the facts of the case, demonstrates that grand jury secrecy was afforded inadequate protection in this proceeding and that the policy of grand jury secrecy enunciated by this Court in *Procter & Gamble* is now without vitality in the Ninth Circuit.

B. The Decision of the Court of Appeals Conflicts With Decisions of Other Circuits.

There is also a conflict among the circuits which have considered this issue of the appropriate standard of particularized need to be applied. On the one hand, the Fifth Circuit has stated that a primary reason for grand jury secrecy is "to create a sanctuary, inviolate to *any* intrusion except on proof of some special and overriding need . . .[footnote omitted]." *State of Texas v. United States Steel Corp.*, 546 F.2d 626, 629 (5th Cir.), *cert. denied*, 45 U.S.L.W. 3238 (1977). The Fifth Circuit has

adhered to the strict standard of *Procter & Gamble* and has required a showing of compelling necessity. *C.f., Baker v. United States Steel Corp.*, 492 F.2d 1074, 1079 (2nd Cir. 1974) where the Second Circuit indicated its disapproval of a standard of "slight need" in this context. The Seventh Circuit, in *State of Illinois v. Sarbaugh*, 552 F.2d 768, 775-777 (7th Cir.), *cert. denied sub nom., J. L. Simmons Co. v. Illinois*, 46 U.S.L.W. 3238 (1977), has permitted access to grand jury transcripts on a showing of need which was less than a "compelling necessity", but even in that case the required showing was greater than that made here. Unlike this case, the civil action in *Sarbaugh* alleged the identical conspiracy charged in the indictment.[11]

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[11] Douglas and Phillips are aware of one other currently pending petition for writ of certiorari, *Alton Box Board Company, et al., and Richard Eldh v. United States* (In Re Folding Carton Antitrust Litigation), No. 77-1390, which raises issues similar to those raised herein concerning the adequacy of a showing of particularized need. The *Alton Box Board* case, however, does not raise the additional problem presented by this case, *i.e.*, the granting of a civil plaintiff's petition for discovery of grand jury transcripts by the judge in a jurisdiction other than the one in which the civil lawsuit is pending.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit in this action.

DATED: April 27, 1978.

Respectfully submitted,

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Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETROL STOPS NORTHWEST,
GAS-A-TRON OF ARIZONA, AND
COINOCO,
Appellees,

v.

UNITED STATES OF AMERICA,
Respondent,

DOUGLAS OIL COMPANY OF
CALIFORNIA,
PHILLIPS PETROLEUM COMPANY,
Appellants.

March 30, 1978

No. 77-2305

OPINION

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Before: CARTER and GOODWIN, Circuit Judges, and SOLOMON*, District Judge.

GOODWIN, Circuit Judge:

Two oil companies that had entered *nolo contendere* pleas in criminal-antitrust cases appeal an order in related civil litigation which permits the civil plaintiffs substantial discovery of evidence collected by the government in the criminal case.

Petrol Stops and associated plaintiff companies are suing Douglas Oil, Phillips Petroleum, and other defendant oil companies in the District of Arizona for damages for alleged antitrust violations. After the damage action was filed, the United States brought the criminal antitrust charges against the same defendants in the Central

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* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

District of California. The indictment charged antitrust conduct similar to that alleged in the damage action. After the court in the criminal case accepted the *nolo contendere* pleas from all the defendants, the criminal cases were concluded. Thereupon Petrol Stops filed a petition in the district court in Los Angeles, seeking disclosure of testimony and materials which Douglas, Phillips, and their employees had provided the grand jury during its investigations in that district.

The United States, the only respondent to Petrol Stops' petition, stated that it had no objection to the disclosure. Douglas and Phillips, styling themselves real parties in interest, appeared and opposed the petition. The district court granted Petrol Stops' request, subject to a protective order which limited disclosure to Petrol Stops' attorneys, prohibited further copying, limited the use of the evidence to impeachment, refreshing recollection, and testing credibility, and required return of the materials when they were no longer needed. Douglas and Phillips raise a number of issues in challenging the order.

I

The first issue is standing to appeal. Douglas and Phillips were not named as parties below, and the United States, the only named party respondent, declines to participate in this appeal. The district court's order does not require Douglas or Phillips to do anything, and they did not seek to intervene in that court.

The Third Circuit has held on such facts that parties situated somewhat similarly have no standing to oppose production of grand jury documents. *United States v. American Oil Company*, 456 F.2d 1043 (3d Cir. 1972).

We hold, however, that Douglas and Phillips have standing. The proceeding directly affects their interests.

After the United States declined to oppose the petition, Douglas and Phillips were the only parties who could provide the adversity necessary for the full presentation of all issues.

While grand jury secrecy primarily protects the public interest in assuring full disclosure to the grand jury, it also protects some important private interests. One is the avoidance of public disclosure of normally confidential information. Another is the protection of those who provide information.

Douglas and Phillips might be injured in fact by disclosure. They are arguably within the zone of interests which grand jury secrecy protects. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152-53 (1970).[1] While the United States is the primary proponent of the public interests involved, Petrol Stops suggests no reason for denying to Douglas and Phillips the right to assert a public-interest point in a matter in which the public interest may also protect them.

Petrol Stops candidly seeks discovery of evidence to use against Douglas and Phillips in a civil case. If Petrol Stops sought the identical evidence by a civil discovery motion, Douglas and Phillips, without question, would have standing to resist the motion.

The district court in Arizona might hesitate to grant discovery in the civil case, either because it has no direct connection with the grand jury, or because of deference to the district court which convened the grand jury. By petitioning the court in the district in which the grand jury sat, Petrol Stops avoided any jurisdictional dispute.

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[1] There are obvious differences between *Data Processing* and this case; among them are that Douglas and Phillips are seeking standing as respondents, not as petitioners, and that this proceeding is not an administrative review. However, *Data Processing* is, at least in part, constitutionally based, and we find its analysis helpful here.

It does not follow, however, that Douglas and Phillips should have no opportunity to participate. It may have been better for Douglas and Phillips to intervene as respondents in the district court, but the question is before us and we are satisfied that standing exists.[2]

II

Because grand jury secrecy serves a number of public purposes, a civil litigant may not violate it at his pleasure. It is not sufficient that the litigant might find it useful to do so. The Supreme Court requires a showing of particularized need before allowing disclosure. In *United States v. Proctor & Gamble Co.*, 356 U.S. 677 (1958), the court refused to allow wholesale production of a grand jury transcript to a civil antitrust defendant able to show only that the transcript would be useful in preparing the defense. In *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959), the court rejected a claim that civil defendants had a right to the transcript because it dealt with subjects which the same witness later covered at the trial. Nothing had appeared in the case at the time to indicate possible inconsistencies in the testimony.

The cases teach that disclosure would be proper when the ends of justice required. Defendants in such cases undoubtedly keep copies of all documents they furnish the grand jury, and they have frequent and informal contact with their employees who testify. The court reasonably could conclude that a plaintiff's need for grand jury records to ferret out the facts in a private antitrust action might be far more compelling than a defendant's curiosity about what its employees may have disclosed.

[2] Our conclusion and some of our reasoning follows that of the Seventh Circuit in the very similar case of *Illinois v. Sarbaugh*, 552 F.2d 768 (7th Cir.), *cert. denied sub nom. J.L. Simmons v. Illinois*, 46 U.S.L.W. 3238 (1977).

We previously applied the Supreme Court's standards in *U.S. Industries, Inc., v. United States District Court*, 345 F.2d 18 (9th Cir.), *cert. denied*, 382 U.S. 814 (1965). The trial court had ordered that the plaintiffs in a private antitrust suit be given access to a government presentencing memorandum, based in part on grand jury material, in a prior antitrust prosecution. U.S. Industries, the defendant in both actions, had examined the memorandum. We affirmed the trial court's action after deleting some statements from the disclosure. In doing so we held that, because the criminal case was over, only one of the five classic reasons for grand jury secrecy,[3] that of insuring untrammeled disclosure by future witnesses, applied. This reason, which was not strong, had to be balanced against the plaintiff's need for the information, which need not be great. "[I]f the reasons for maintaining secrecy do not apply at all in a given situation, or apply only to an insignificant degree, the party seeking disclosure should not be required to demonstrate a large compelling need." 345 F.2d at 21.

District courts generally adopt a similar analysis in this situation. The consideration they find to be relevant is that of protecting witnesses from retaliation. Corporate witnesses are vulnerable to their corporate em-

[3] The reasons were first stated in *United States v. Amazon Ind. Chem. Corp.*, 55 F.2d 254 (D. Md. 1931); the Supreme Court adopted them in *United States v. Procter & Gamble*, 356 U.S. at 681-82, n.6. They are: "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at a trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

ployers, but the need for protection is limited after the corporation already has its employees' testimony. Limiting the use of the materials can give adequate assurances of safety to future witnesses. Thus, most courts grant access with only a minimal showing of particularized need; they commonly see use of the material for inpeachment as sufficient. *SEC. v. National Student Marketing*, 430 F. Supp. 639 (D.D.C. 1977); *In Re Cement-Concrete Block, Chicago Area, Grand Jury Proceedings*, 381 F. Supp. 1108 (N.D. Ill. 1974); *Illinois v. Harpor & Row Publishers, Inc.*, 50 F.R.D. 37 (N.D. Ill. E.D. 1969). Courts do not, however, generally see a request for general discovery, or a mere showing that the other party already has access, as sufficient. *Texas v. United States Steel Corp.*, 546 F.2d 626 (5th Cir.), *cert. denied*, 46 U.S.L.W. 3238 (1977); *A.B.C. Great Stores, Inc. v. Globe Ticket Co.*, 309 F. Supp. 181 (E.D. Pa. 1970); *Minnesota v. United States Steel Corp.*, 44 F.R.D. 559 (D. Minn. 1968).

While the Fifth Circuit, in *Texas v. United States Steel Corp., supra*, recently held that a grant of access with little if any showing of particularized need was an abuse of discretion, it recognizes that disclosure is proper if the material is needed for purposes such as impeaching a witness or refreshing recollection. *Allis-Chalmers Manufacturing Company v. City of Fort Pierce*, 323 F.2d 233, 238 (5th Cir. 1963). The Seventh Circuit, in a well-reasoned opinion with facts almost identical to those involved here, recently held a denial of access to be an abuse of discretion. *Illinois v. Sarbaugh*, 552 F.2d 786 (7th Cir.), *cert. denied sub nom. J.L. Simmons Co. v. Illinois*, 46 U.S.L.W. 3238 (1977).

U.S. Industries, Inc. v. United States District Court, supra, thus continues to provide the guidelines that courts generally follow. The question now is whether the

district court exercised its discretion within those guidelines.

The criminal case has been concluded, and, in contrast to the cases which the Supreme Court decided, the United States has no objection to disclosure. Douglas and Phillips already have all the materials requested by their adversary, and there is no indication that granting Petrol Stops' petition would expose witnesses to new sources of retaliation. The public-interest side of the balance therefore is lightly weighted.[4]

Petrol Stops showed a particularized need beyond the mere relevance of the materials. It showed that some of the answers Douglas and Phillips made to its interrogatories might contradict the charges in the indictment. Since Douglas and Phillips entered *nolo contendere* pleas, there is a strong inference that the grand jury materials support the government's charges.[5] The materials might thus be relevant for impeachment, one of the classic reasons for making them available.

On appeal Petrol Stops makes a stronger showing, pointing out inconsistencies between the government's bill of particulars and statements made in recent depositions. However, even at the district court, Petrol Stops did not seek the materials merely for a general fishing expedition. It made a sufficient showing of particularized

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[4] We think that the Central District of California court was the proper district court to consider the issue. It was best situated to evaluate the need for continuing secrecy and may have been the only court with jurisdiction under Fed. R. Crim. P. 6(e). *See Illinois v. Sarbaugh*, 552 F.2d at 772-73. The district court for the District of Arizona apparently hesitated to grant discovery of these materials because of its inability to evaluate the need for continued secrecy.

[5] In its petition Petrol Stops inaccurately stated that they pleaded guilty; we do not think that the different inferences to be drawn from the two pleas are great enough to matter here.

need, in light of the weakness of the reasons offered for opposing disclosure.

The district court recognized that some particularized need was necessary but that it did not have to be great. While it authorized disclosure, it imposed a stringent protective order limiting the persons to whom the materials could be disclosed and the uses Petrol Stops could make of them. This carefully limited disclosure was not an abuse of discretion. Denial of disclosure might well have been an abuse.

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE WILLIAM P. GRAY,
JUDGE PRESIDING

PETROL STOPS NORTHWEST, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent,

DOUGLAS OIL COMPANY OF CALIFORNIA, et al.,
Real Parties In Interest.

Miscellaneous
No. 5706

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, March 28, 1977

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APPEARANCES:

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LOS ANGELES, CALIFORNIA,
MONDAY, MARCH 28, 1977; 2:00 P.M.

THE CLERK: Item No. 18, Miscellaneous 5706, Petrol Stops Northwest v. United States of America and others. Motion of petitioner for production, inspection, et cetera of grand jury transcripts.

MR. THURSTON: Good morning, your Honor. I am Morris Thurston of Latham & Watkins for I guess the real party in interest Douglas Oil Company.

THE COURT: All right. You are the fellow that wrote that very able brief.

MR. THURSTON: I am not certain about that, your Honor. I have here also Mr. Bliss. I am not sure whose brief you are referring to so I hate to take credit for his work. Mr. Bliss represents Phillips Petroleum.

THE COURT: Good afternoon, Mr. Bliss.

MR. BLISS: Good afternoon, your Honor.

MR. PARRY: Your Honor, my name is Douglas Parry. This is Daniel Berman. We represent the petitioners in this action.

THE COURT: Yes.

MR. HERNACKI: Raymond Hernacki on behalf of the Antitrust Division. I think I am just a bystander in this proceeding, your Honor.

THE COURT: All right. Gentlemen, I will be glad to hear such arguments as you might find appropriate. Rather than have you argue in a vacuum, suppose I give you the Court's impressions, having read your papers.

In the first place, I think this Court has full jurisdiction to consider the matter. The defendants Phillips and Douglas raised that point. As a matter of fact, if Judge

Holtzoff is right, and he was a pretty good judge in the District of Columbia, this court would be the only one that would have jurisdiction. That is what he said in the case of Herman Schwabe, Inc. v. United Shoe Machinery.

And the Seventh Circuit in the In Re April 1956 Term Grand Jury also expressed the view that the court where the grand jury sits is the one that has jurisdiction. I think there is considerable reason for that. Although personally I have no information about the considerations of problems that the grand jury had when they considered this matter, presumably the judge who was the criminal duty judge at that time might well have had some knowledge of what the grand jury was considering and the problems in connection with it. But certainly the criminal duty judge of this court is better able to determine the sensitivity of grand jury proceedings than is a court in another district.

In any event, I conclude that I have jurisdiction over the matter and am disposed to proceed with that in mind.

With respect to the merits, the Procter & Gamble case says that the petitioners must show a particularized need. As I think it was Justice Douglas in that case said, this requires a lot of balancing.

First, it seems to me that seeking to obtain this information for purposes of impeachment constitutes a valid purpose in itself. The District Court in the Northern District of Illinois, Judge Ed Robson, had almost this very same problem in the case of In Re Cement Concrete Block at 381 F.Supp, almost the identical problem, and he concluded that the expression of need to hear what these employees have said before the grand jury in order that they might be prepared to impeach their testimony is a valid basis for seeking the information given by such employees at the grand jury hearing. His opinion is also relevant in another respect that I will mention in just a minute.

Also, another thing to consider in doing this balancing is the validity or the pertinence of the reasons for maintaining secrecy of grand jury proceedings.

In Judge Barnes's opinion in the Ninth Circuit case of U. S. Industries v. The United States District Court for the Southern District of California, Judge Barnes, just as Judge Robson did in the case that I just mentioned, talked about five classic reasons for secrecy in grand jury proceedings. The first is to prevent escape of those whose indictment may be contemplated, which is not pertinent here.

The second is to ensure the utmost freedom to the grand jury in its deliberations and to prevent persons subject to indictment or their friends from importuning grand jurors. Of course the grand jury has long since been discharged and that isn't of pertinence anymore.

The third is to prevent subornation of perjury or tampering with a witness who may testify before the grand jury and who may later appear for trial. That isn't of any relevance anymore.

The fourth is to encourage free and untrammeled disclosure by persons who have information with respect to the commission of crimes. That is pertinent.

The fifth is to protect an innocent accused who is exonerated of the fact that he is under investigation and the expense of standing trial. That isn't of pertinence anymore.

So the fourth is the only one that has pertinence, but the defendants in this case have all the information. As I understand it from the government, representatives of Douglas and Phillips did examine the transcripts of the testimony of their fellow employees or their employees, and it is only the testimony of those people that is sought in the first request, as I understand it. The petitioners seek the information with respect to the transcripts that

were made available to Douglas and Phillips, and also they seek the documents that were submitted by Douglas and Phillips. So, if Douglas and Phillips have the information, then the need to withdraw it for the fourth purpose seems to me to disappear.

And when you get right down to it, this is a civil antitrust action. I don't know what those people said. I don't know whether their testimony would help Douglas or help the plaintiffs, but in matters of discovery it is best that both sides have the information available. That is what discovery is for. Douglas and Phillips have that information; I can't see any valid reason why the petitioners should not have it also.

All right, that is where the laboring oar lies, gentlemen. Do you want to pull it?

MR. THURSTON: Your Honor, perhaps two points. The first one goes perhaps more to the substance of the last comment that you made. There is a very recent case very recently reported — in fact reported after we had filed our brief — entitled the State of Texas v. United States Steel Corp., 546 F.2d 627. It is a Fifth Circuit case. In that case it was pointed out that a corporation obtaining grand jury transcripts of its own employees did not destroy the supposed grand jury secrecy. I think the rationale behind that case is that employees are not reluctant to have their own employers see what it is that they have testified to. The grand jury secrecy can be maintained within the company, within the family, so to speak. When the secrecy goes further, it is a different matter.

But with that sort of a sideline comment, I suppose, the main thrust of my comments would be that while we do not dispute that your Honor has jurisdiction over the petition here, we question whether that jurisdiction needs to be exercised at the present time or whether the question

is really ripe. These petitioners have a civil case going in the State of Arizona. They have asked for discovery of these materials in that Arizona case. The defendants have, as you pointed out, all of the grand jury transcripts and all of the documents in their possession. It seems to me that the Arizona court does have both jurisdiction and probably a better feel for whether or not the traditional discovery methods are appropriate here and whether or not these materials should be discovered through those methods.

THE COURT: Who is the judge in Arizona?

MR. THURSTON: Judge Walsh and Judge Frey.

THE COURT: I have no desire to poach on Judge Walsh or Judge Frey's territory, but if they read the law the same way I do, why, they might be hesitant to allow petitioners to have access to the grand jury transcripts even though in the possession of the defendants, who presumably would say, "Well, we only got this by special dispensation but we are not at liberty to divulge it."

I would be very glad through an overabundance of precaution, if you think it would be appropriate, to telephone Judge Walsh and Judge Frey to see if they have any objection, but it doesn't seem to me that I should relegate these people to make their application to those judges when they have taken what I think is a proper step in coming here.

Anyway, how would Judge Walsh or Judge Frey have any objection to the avoidance of a discovery scrap before them? If on some other proper basis the petitioners can get the information, why would they care?

MR. THURSTON: Your Honor, I think the question here is whether or not the materials sought by these plaintiffs are relevant to the lawsuit that they have brought. Judges Walsh and Frey ought to be able to

make that decision. It would seem to me, having made that decision, if there was yet a question as to whether the transcripts could be turned over, at that time perhaps it is ripe and appropriate for this Court to make that decision; but the initial relevancy decision, it would seem to me, would go both to the propriety of the initial discovery and to the question of particularized need. If those judges determine they are not relevant, it seems to me that the particularized need is very difficult to show here.

THE COURT: The petitioners seem to think it is relevant. Apparently it involves an allegation of antitrust violation by Douglas and Phillips, and apparently that is what the grand jury proceeding involved. Apparently employees of Douglas and Phillips testified. They may be the same employees that will be expected to testify again. I don't know. But suppose it isn't relevant? If there is no harm in going through the list of reasons of the sanctity of the grand jury proceedings, if there is no harm in its being divulged, why are we worried particularly about whether or not it is relevant?

MR. THURSTON: Your Honor, I think that one of the reasons for grand jury secrecy, and it is perhaps embodied in the ones that you mentioned, is that these proceedings are not just to be spread over to the public —

THE COURT: That is right.

MR. THURSTON: — to look at possible violations that have no particular relevance to anything. It is possible that there were — not possible. It is the fact that those grand jury proceedings concerned a number of different levels of sale, both at the wholesale and retail levels, whereas the proceedings in Arizona may not involve such a broad territory. It just seems, if the relevancy is first established in Arizona, then we've got a good reason to come here to this court, but if that —

THE COURT: I am not going to deny the motion. If through any stretch of imagination I could conclude that Judge Walsh or Judge Frey would be disposed to say, "Oh, I would rather you keep your hands off and let us decide whether it is proper for them to give this information or not," I would be very glad to make that inquiry. But I have grave doubt that they would express any such concern.

As far as relevance, I would think that there is a prima facie relevance because of the nature of the grand jury inquiry with relation to the proceedings here concerned.

MR. THURSTON: It is true, your Honor, that the grand jury inquired as to antitrust violations, but, of course, there is a very wide range of possibilities there.

THE COURT: Yes. Would you educate the Court as to why you think this information may be relevant, gentlemen. Anybody from your side.

MR. BERMAN: Your Honor, the complaint and indictment contain absolutely identical and parallel allegations with regard to prices on the sale of gasoline through and to independent marketers.

THE COURT: You filed your complaint on the basis that there was a nolo contendere plea on the prosecution here?

MR. BERMAN: We filed our complaint first before the indictment, your Honor, but the indictments — and I have the paragraph citations — are absolutely parallel to the charging paragraphs of the indictment, and that I think establishes the relevancy.

THE COURT: If it was relevant to the grand jury inquiry, it would ipso facto be relevant to your case as far as you are concerned?

MR. BERMAN: That is correct, your Honor.

THE COURT: All right.

MR. BLISS: Your Honor, if I may speak to the relevancy question. Harold Bliss. The plaintiffs' complaints were filed well over a year before the grand jury indictment.

THE COURT: A year before?

MR. BLISS: Yes, your Honor. The Gas-A-Tron case involves only retail sales in Arizona. The plaintiffs in Arizona are engaged in the retail gasoline business, principally in Tucson, Arizona. None of the — well, the only supplier that the plaintiff had was Eugene Lewis, Lewis Arizona Oil Co., and Mr. Lewis' supplier was Shell Oil Company. Now, Shell Oil Company was not indicted and Shell Oil was not named as an unindicted co-conspirator, nor was Lewis Oil Co. So, if Phillips and Douglas had conspired to fix the wholesale price, it wouldn't have any effect on the plaintiffs because they didn't receive their supply from either the indicted companies or the alleged co-conspirators.

In the Petrol Stops complaint, there are thirty-one different types of Sherman Act violations alleged. Since that suit was filed the deposition has been taken by the defendants of Mr. Robert Borgert, who is one of the partners and the chief operating officer of Petrol Stops, and through that deposition we have been able to narrow down the scope of that lawsuit. Essentially what he is talking about, and I have cited the pages in my brief and I have attached copies of the deposition pages, he is talking about attempts to control his business at the retail level to get him to engage in retail price fixing. He says this was done by solicitations to have them join; by comments made by one or more of his suppliers that he has to get his prices in line or he is going to lose supply; and by predatory pricing by the defendants in that they would bring in subsidy, drive the price down

below his buying price and attempt to put him out of business. Not once in there did he say that he is complaining about wholesale price fixing. We have fourteen pages in over 2200 pages of testimony, and nowhere in there does he make the complaint that he is talking about a wholesale price fixing case. He is talking about activities at the retail level.

For that reason we are saying that the grand jury indictment, the transcripts and the documents are not relevant to his lawsuit and that this determination should be made by the Arizona court initially. For one reason, there are other defendants and there has been subsequent request to produce documents going to these type of documents and transcripts that are addressed in the Arizona cases that presumably will be decided by Judge Frey or Judge Walsh in the Rule 37 proceeding, which is the way I think this should be handled now rather than over here.

THE COURT: All right, thank you.

MR. BLISS: That is all I have to say about relevance at the moment.

THE COURT: All right. I am not going to make any orders upon the defendants. I am not going, in effect, to issue upon the defendants a demand to produce. If the plaintiff wants to get the defendants to produce anything, that can be done through that litigation. But the petitioners have asked for access to certain grand jury records, and that request will be granted with respect to the first request. That is the one where you asked for access to the same information that was accorded the defendants and the documents that they produced.

Have I correctly articulated your request?

MR. BERMAN: That is correct, your Honor.

THE COURT: And the Government so understands it?

MR. HERNACKI: Yes, your Honor.

THE COURT: All right, that access will be made.

What is your name, sir?

MR. HERNACKI: Hernacki.

THE COURT: Mr. Hernacki, you said the best way to do it would be to have the defendants make the papers that they got from the grand jury available. I am not going to do it that way. You make arrangements with the petitioners to have access to that information. If Phillips and Douglas want to cooperate in the mechanics of reproduction that is all right, but my order is simply that the grand jury records will be opened up to that limited extent. Do you understand, sir?

MR. HERNACKI: In other words, your Honor, we are to make the documents available; however, if Phillips and Douglas wish themselves to produce a set of documents —

THE COURT: That is up to them.

MR. HERNACKI: — that is up to them.

THE COURT: That is a matter among you.

MR. HERNACKI: Yes.

THE COURT: My order is simply that the custodians of the grand jury records will make them available to that extent to the petitioners. That is with respect to the first request.

With respect to your second request, I am about to deny it. In the first place, as I think Phillips and the Government said, there are no points and authorities and there is no need shown with respect to them. Also, some of this information that was before the grand jury may have come from or be relevant to competitors or something of that kind. I don't think there is any showing that would justify your having any more than you asked for in the first request.

MR. PERRY: Excuse me, your Honor. The second request was not to be before the Court today. We made an agreement a month or so ago that we would not involve in this hearing any of the parties other than Phillips, Douglas and Continental.

THE COURT: I see.

MR. PARRY: That one was filed improperly. Hearing date would have to be set in the future after proper briefs and memorandums have been filed.

THE COURT: All right.

MR. PARRY: That was our mistake, your Honor.

THE COURT: If I am not asked to rule on that, I am not doing so. But now you understand who has the uphill battle on that one.

MR. BERMAN: Yes, your Honor.

THE COURT: Anything further, gentlemen?

MR. BLISS: Your honor, my initial comments were restricted solely to relevance. I would like to talk about the cases on the merits of disclosing the grand jury documents.

You referred to Judge Robson's decision in the Concrete Block case as far as impeachment is concerned. The plaintiffs have cited a number of other cases in which transcripts were made available to civil plaintiffs. In all of those cases, your Honor, a deposition was being taken and the deponent was evasive or couldn't remember anything.

In this case no deposition has even been noticed of any defendants. There hasn't been any opportunity for them to be shown to be vague or unresponsive or to fail to recollect what the testimony is, and there has been no

particularized showing of a compelling need. Until there is something of that nature, I believe the transcripts should remain secret, as they have been ruled in the State of Texas vs. U. S. Steel Corporation that Mr. Thurston referred to. I think that case disposes of the numerous district court cases that the petitioners have cited, saying that if the defendant has them under Rule 16 of the federal criminal rules that then there is no need for particularized showing of compelling need. I think that is the most recent authority out of the Fifth Circuit, and I think it is correct.

As far as the U. S. Industries case is concerned, that case involved a governmental pre-sentencing memorandum that had been shown to the defendants. The petitioners could not get that any other way but through the Government. Here we have the documents; we have the transcripts. We can make them available to them — that is, our copies — if the Court that has the civil anti-trust case compels us to under Rule 37.

As far as the jurisdictional question, your Honor, we do not challenge the Court's jurisdiction.

THE COURT: All right.

MR. BLISS: The Herman Schwabe case dealt with the grand jury minutes and an attempt to get it in the wrong district court. That is not what we are talking about here.

THE COURT: It comes pretty close, doesn't it? The results of grand jury proceedings.

MR. BLISS: The minutes were in the possession of the court in Massachusetts, not in the District of Columbia.

THE COURT: Sure.

MR. BLISS: We are talking about our documents of which we have copies and transcripts of which we have copies.

THE COURT: Yes.

MR. BLISS: In the Seventh Circuit case, that statement by the court was simply in the context of whether a court should interfere with an ongoing grand jury. It says it is under the control of the Court, not a —

THE COURT: I have read your authorities, Mr. Bliss. I am still of the same mind.

There is one thing, gentlemen. That information will be given to you under a protective order, however. You are not to disclose it. You are to use it only for purposes of this litigation. Is there any reason why it needs to be disclosed to anybody other than you or your lawyer colleagues?

MR. BERMAN: No, your Honor. If the order can be that it only be disclosed to counsel for the petitioners to be used solely for the purposes of the litigation and applicable proceedings in that litigation, that is fine.

THE COURT: Prepare an appropriate order and include that protective order.

MR. THURSTON: Your Honor, a suggestion of perhaps one further protection. In previous proceedings of this nature it has been stipulated that when these grand jury transcripts go out they are to go back to the Government at the conclusion of the proceedings. Can we incorporate that?

THE COURT: Yes, I think we can incorporate that, too. Any objection to that?

MR. BERMAN: None at all, your Honor.

THE COURT: All right. That will be included.

Will you prepare an appropriate order?

MR. BERMAN: We will, your Honor.

THE COURT: All right, gentlemen. Thank you.

IN THE UNITED STATES DISTRICT COURT
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Real Parties In Interest.

Miscellaneous
No. 5706

CERTIFICATE

I hereby certify that I am a daly appointed, qualified and acting official court reporter of the United States District Court for the Central District of California.

I further certify that the foregoing 19 pages are a true and correct transcript of the proceedings had in the above-entitled cause on Monday, March 28, 1977, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 13th day of March, 1977.

Ben Newlander
Official Reporter